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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6360

LIONEL R. WELLMAN and BETTIE WELLMAN,
Petitioners,

vs.

PACER OIL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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OPINIONS BELOW

Respondent concurs in petitioners' statement of opinions below but calls to the Court's attention that the Opinion of the Supreme Court of Missouri, en banc, was reported in 504 S.W. 2d 55.

STATEMENT OF THE CASE

Respondent takes issue with the petitioners' statement of the case and deems it necessary to correct omissions therein.

This cause was filed, tried and argued on appeal solely on the theory of respondeat superior. The petitioners were awarded a judgment in trial against defendant, Gamble, and that judgment is final.

There was no evidence to indicate that defendant, Pacer Oil Company, knew or had any reason to believe that Gamble was a person of violent tendencies at any time prior to the occasion in issue. Neither the defendant, Pacer Oil Company, nor its station manager, Clarke, knew that employee, Gamble, was carrying a gun.

The appeal in this case was first argued in Division One of the Supreme Court of Missouri, and was then transferred to the Court, en banc, which heard arguments and decided the case. The Federal question sought to be reviewed was not raised in the petitioners' brief, or in oral argument, but was raised for the first time in the petitioners' motion for rehearing. The issue of whether the petitioners could produce any evidence that defendant, Pacer Oil Company, knew or had any reason to believe that its employee, Gamble, was a person of violent tendencies was also raised for the first time in the petition for rehearing.

The facts which respondent has added to petitioners' statement of the case are set forth by the Supreme Court of Missouri in its statement of facts in its Opinion.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I.

The Supreme Court of Missouri Did Not Deprive Petitioners of Any Rights in Contravention of Saunders v. Shaw, 244 U.S. 317, 61 L.Ed. 163, 37 S.Ct. 638 (1917), or Helis v. Ward, 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283 (1939); and Those Citations Relied upon by Petitioners Are Completely Inapplicable to This Cause

The petitioners, relying upon *Saunders* v. *Shaw*, 244 U.S. 317, 61 L.Ed. 163, 37 S.Ct. 638 (1917), contend that the Supreme Court of Missouri deprived them of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States by refusing to grant them a new trial.

The case of *Saunders* v. *Shaw*, supra, has no application to this case. There, the trial court excluded certain evidence as inadmissible under the pleadings; but on appeal, the Supreme Court of Louisiana, in reversing the judgment, based its reversal upon the same evidence which had been excluded by the trial court. That case holds that a state Supreme Court can not reverse a lower court decision on facts not in evidence. Here, however, the Supreme Court of Missouri did not in any way utilize facts not in evidence in its decision. Additionally, petitioners made no offer of proof at the time their evidence was rejected.

The petitioners attempt to leave the impression that the appellate decision in this case was based upon the denial of their right to offer certain evidence in the trial

court to bring them within the rule of *Saunders* v. *Shaw*, supra. They have done this by citing portions of the Opinion out of context so that it may appear that what the Court specifically declared was not in issue, was in fact an issue in the decision. Their entire case, from its filing to the point of the appellate decision, was premised solely upon respondeat superior. The transcript of the trial shows that the petitioners were given every opportunity to offer evidence on each issue which they had pleaded.

The petitioners also cite *Helis* v. *Ward*, 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283 (1939), and state that the Supreme Court declined to order a new trial in that case only because the petitioner failed to seek a new trial in his motion for rehearing. But respondent submits that a new trial was requested in petitioners' motion for rehearing in *Helis* v. *Ward*, supra. This court then granted a writ of certiorari. Thereafter, upon oral argument, it became clear that the petitioner's basis for seeking a new trial rested upon entirely different grounds than were set forth in his petition for rehearing or in his petition for a writ of certiorari. For that reason, this Court declined to order a new trial in the case, stating, "Due process of law is not concerned with mere afterthoughts." There is nothing in the opinion of *Helis* v. *Ward*, supra, which justifies review by this Court herein.

The petitioners were satisfied with their theory of the case, and with the evidence which they produced, at trial. When the Supreme Court of Missouri, en banc, reversed the judgment of the trial court and directed entry of judgment in favor of this respondent, the petitioners then apparently decided that they desired to have another chance with a different theory, and a different trial approach. Their theory of the case, and the evidence which

they produced at trial in support of that theory, was a matter of trial technique and does not bring this case within the rule of *Saunders* v. *Shaw*, supra, or *Helis* v. *Ward*, supra.

II.

Since the Petitioners Did Not Properly Raise Their Claimed Federal Question in Accordance with the State Law, There Is No Issue for Review by This Court

The petition filed does not reflect when or how the constitutional issue now presented to this Court was first raised, as required to be shown under Rule 23(f), Rules of the Supreme Court of the United States. That issue was raised when the petitioners filed their petition for rehearing in the Supreme Court of Missouri. Under Missouri law, new issues not submitted in the original briefs and raised for the first time after the opinion is handed down, which are clearly afterthoughts, will not be considered on a motion for rehearing. *Irwin* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 452, 458 (Mo. 1963); *Allen* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460, 467 (Mo. 1963); *Leath* v. *Weaver*, 202 S.W. 2d 125, 131-132 (Mo. 1947). Since the petitioners did not properly raise their claimed Federal question in accordance with the requirements of state law, this Court is without jurisdiction to decide whether constitutional rights have been violated. *Edelman* v. *California*, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); *Saunders* v. *Shaw*, supra; *Hulbert* v. *City of Chicago*, 202 U.S. 275, 50 L.Ed. 1026, 26 S.Ct. 617 (1906); *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 308, 47 L.Ed. 480, 23 S.Ct. 375 (1903).

III.

Since the Decision of the Supreme Court of Missouri Rests upon State Grounds Adequate to Support Its Judgment, There Is No Issue for Review by This Court

The Petition for Rehearing filed in the Supreme Court of Missouri raised more than the constitutional issue now relied upon. That Petition for Rehearing, set forth in Appendix D of the Petition for a Writ of Certiorari, called the attention of the Missouri Supreme Court to alleged material matters of fact overlooked or misinterpreted by the Court in its Opinion. It set forth five separate grounds in subparagraphs (a) through (e), inclusive, none of which raised any Federal constitutional issue. In their Alternate Motion to Remand for a New Trial, the petitioners set forth three separate grounds, (a) through (c), only one of which raised a Federal question.

It is a well-established principle of the Supreme Court of the United States that where the judgment of the state court rests upon more than one ground, one of which is Federal, and the others non-Federal in character, that jurisdiction of the United States Supreme Court fails if the non-Federal grounds are independent of the Federal ground and adequate to support the judgment. Here the noncompliance with state law, in not seasonably raising the Federal issue, is alone an adequate ground for the decision below. Likewise, the state court's determination of the other non-Federal issues raised is also adequate ground for the decision. *Jankovich* v. *Toll Road Comm'n*, 379 U.S. 487, 489, 13 L.Ed. 2d 439, 85 S.Ct. 493 (1965); *Lynch* v. *New York*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934); *Honeyman* v. *Hanan*, 300 U.S. 14, 18, 81 L.Ed. 476, 57 S.Ct. 350 (1937); *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U.S.

293, 297, 35 L.Ed. 193, 11 S.Ct. 528 (1891); *Allen* v. *Arguinbau*, 198 U.S. 149, 154-155, 49 L.Ed. 990, 25 S.Ct. 622 (1905).

IV.

The Decision of the Supreme Court of Missouri, En Banc, Is Not a Change in the Law of Respondeat Superior

The petitioners' suggestion that the decision of the Missouri Supreme Court somehow drastically changed the law in that state as it had existed for a period of years is without merit.

In Missouri, as elsewhere, the employer is not absolutely liable for the acts of his employees. The employer has always been held responsible for damages sustained by reason of the acts of his employees, but only if they were committed both in the course and in the scope of employment. The decision in this case did not change the law.

The Supreme Court of Missouri had before it in this case a factual picture far different than had been presented in the prior cases of *Haehl* v. *Wabash R. Co.*, 119 Mo. 225, 24 S.W. 737 (1893) and *Panjwani* v. *Star Service and Petroleum Co.*, 395 S.W. 2d 129 (Mo. 1965). It specifically distinguished both of those decisions as factually different. The Court stated, ". . . It may be that *Haehl* is distinguishable from our decision in this case on the theory that the railroad should have anticipated that their watchman might use unnecessary violence in the performance of his duties . . . ." and ". . . while the facts in *Panjwani* differ from those in the case at bar, . . ." *Wellman* v. *Pacer Oil Co.*, supra, at 60. The Missouri Supreme Court held in this case that the actions of the employee, Gamble, "were so out-

rageous and criminal - so excessively violent as to be totally without reason or responsibility - and hence must be said, as a matter of law, not to be within the scope of his employment." *Wellman* v. *Pacer Oil Co.*, supra, at 58. This is particularly true when the employer did not even know he had a weapon.

In deciding this cause, the Supreme Court of Missouri adopted applicable sections of the Restatement of Agency and certain judicial decisions which had been the law for many years in other jurisdictions. Those decisions and the sections from the Restatement of Agency, were cited in the briefs of the parties and discussed in the oral arguments on appeal.

The basic legal principles in the two prior Missouri decisions, *Haehl* and *Panjwani*, supra, cited by petitioners, and those enunciated in the Opinion of the Missouri Supreme Court, remain the same. A factual situation involving violence so outrageous in the context of scope of employment simply had not confronted the Missouri appellate courts prior to this cause. Some consideration has always been given by the courts of Missouri, and elsewhere, to the nature of the act complained of contrasted with the work and duties normally performed by the employee.

It should be noted that *Haehl* and *Panjwani*, supra, were decided by divisions of the Missouri Supreme Court, not by the full court as in this cause. Further, those cases, while distinguished from this case, have not been overruled and are still the law of Missouri. They are still applicable to respondeat superior cases where the conduct of the employee is not so outrageous and totally without reason or responsibility as to bring it within the holding in this case.

V.

The Petitioners Were Not Denied the Right to Prove Any Aspect of Their Case and Have Misconstrued the Holding and Issues Involved

Unfortunately, the petitioners have misread or misunderstood the Opinion of the Supreme Court of Missouri. In their "Reasons Relied On For The Allowance Of The Writ," they have, on several occasions, quoted out of context the holding of the Supreme Court of Missouri, which a careful reading of that Opinion will clearly reflect.

Respondent hesitates to burden this Court, but feels compelled to point out herein the several times when petitioners have taken out of context portions of the Opinion of the Supreme Court of Missouri. This is apparently done by petitioners in an effort to leave the impression with this Court that they were erroneously denied the admission of evidence by the trial court.

In the very first paragraph on page five, designated "(a)", petitioners have technically misquoted the majority opinion of Judge Holman by stating that the opinion was based upon "the application of a theory or principle that has not heretofore been applied in Missouri." What Judge Holman actually said was, ". . . we have decided that this case should be ruled upon a theory or principle that has not heretofore been *expressly* applied in this state." (Emphasis added). The deletion of the word "expressly" from petitioners' statement of the majority opinion leaves an entirely different impression than was intended by the Court in that Opinion.

Next, in the second paragraph on page five, petitioners purport to set out the holding of the case and the reason therefor by stating:

> "The Supreme Court of Missouri reversed the judgment of the trial court by finding that the act of the employee in charge, Gamble, was outrageous and criminal and that the employer cannot be liable *inasmuch as there was no evidence to indicate that the employer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question. . . .*" (Emphasis added).

The first part of the above quotation from the petition filed in this Court is a correct statement of the holding of the Supreme Court of Missouri. The remainder of that sentence (the part which is italicized for emphasis) is completely out of context. The decision was not based on whether or not Gamble had violent tendencies, or the absence of evidence therefor, as that issue was not raised in the pleadings. The Supreme Court of Missouri simply stated in its Opinion that whether or not Gamble was a person of violent tendencies, was not an issue in the case. The petitioners put a portion of the Court's statement of facts with regard to what was not an issue in the case with a portion of the holding of the case, to make it appear that the decision was based upon facts not even in issue.

The attempt of petitioners is further illustrated by reference to the quotation set forth at the bottom of page five and the top of page six of their petition. Petitioners' quotation was part of the Court's statement of facts, but, as set out, leaves an impression that there is a holding on whether Gamble was a person of violent tendencies. Alleged negligent hiring, or the vicious propensity of the employee, was never pleaded in this case and never claimed at any time throughout the trial or on the appeal. Peti-

tioners first raised that issue in their petition for rehearing. It is therefore incorrect for petitioners, consciously or unconsciously, to leave the impression that the decision of the Supreme Court of Missouri was somehow based upon an issue of alleged violent tendencies of the employee, when in fact, that was not an issue for the Court on appeal.

Following a quotation from page eight of the Opinion (page six of the plaintiff's petition herein), again taken from the Court's statement of facts, which indicated the Court was not deciding the vicious propensities issue, petitioners state, "So saying, the Supreme Court of Missouri reversed the judgment of the trial court. . . ." This again leaves the erroneous impression that the Supreme Court reversed the judgment of the petitioners based upon what is set forth in the preceding quotation from the statement of facts. This simply is not true as that issue was not involved.

Illustrative of how far the petitioners have gone is evidenced by their effort to contend that they were denied the right to introduce evidence during trial on the non-issue of alleged violent tendency of an employee. The trial court sustained objections to such proffered evidence, and properly so, because it was not then being claimed by petitioners as a ground of liability of Pacer Oil Company. No offer of proof was made as required by law and no request was ever made to amend the pleadings. Furthermore, this is a completely false issue because the trial transcript shows that the depositions of the manager of the service station as well as the Vice President of Pacer Oil Company were taken, and that none of that testimony showed that Pacer Oil Company had any knowledge of any alleged violent tendencies of Gamble, if, in fact, there were any.

If petitioners could have developed such evidence, they would have done so and would have pleaded and tried the case on that issue. Failing to do so, they now seek to use it as a route to give them another trial. Having not pleaded the issue of alleged violent propensities, having failed to develop any evidence to substantiate the same, and having raised that issue for the first time in their petition for rehearing, petitioners, nevertheless, now contend that they were denied a new trial on excluded evidence on an issue not then claimed, which was not then admissible, and which they could not prove if they had claimed it.

Finally, on page eight of the petition herein, petitioners state they attempted to introduce evidence at trial that "defendant, Pacer Oil Company, would have hired employee, Gamble, even if it had known he was a convicted criminal, to say nothing of tendencies to violence." This is a misstatement of the trial record. The plaintiff's efforts to inquire into whether Pacer Oil Company would have hired Gamble even if he had a criminal record was a hypothetical question and was properly excluded on objection because it was not relevant to the pleaded issues of respondeat superior. There was no evidence, actual, or offered and refused, of supposed "convictions" or of "violent tendencies".

CONCLUSION

Under the provisions of Rule 19, Rules of the Supreme Court of the United States, this Court has set forth the types of cases which may, in its discretion, call for the issuance of a writ of certiorari. For each and all of the reasons set forth above, respondent submits that the petitioners have failed to show that the decision of the Supreme Court of Missouri in this cause presents any question to be settled by this Court.

Respectfully submitted,

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